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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

COMMENTS

The National Exchange Carrier Association, Inc. (NECA) submits its comments in response to the Commission's Further Notice of Proposed Rulemaking (FNPRM) in the above-captioned matter.[1]

In the FNPRM, the Commission specifically asks whether requesting carriers may use unbundled transport facilities and unbundled switching purchased from incumbent local exchange carriers (ILECs) to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.[2] The Commission states that absent a requirement that carriers provide local exchange service, an interexchange carrier (IXC) could request unbundled elements for the purpose of carrying originating or terminating interstate toll traffic.[3]

In these comments, NECA shows why IXCs should not be permitted to obtain local

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[1] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 97-295, CC Docket Nos. 96-98 and 95-185 (rel. Aug. 18, 1997).

[2] *Id* at ¶ 61.

[3] *Id.*

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"services and facilities" solely to originate or terminate interstate toll services at prices other than Part 69 access charges. NECA further explains how sections 251 and 252 of the 1996 Act, including section 251(c)(3), are intended to apply only to those carriers actually competing in the local exchange market, not to those providing only interstate toll services. Absent fundamental changes to the current rules governing the separation and recovery of interstate costs, the Commission should not permit IXCs to avoid payment of interstate access charges assessed pursuant to Commission rules.

I. IXCs SHOULD NOT BE PERMITTED TO OBTAIN LOCAL "SERVICES AND FACILITIES" TO ORIGINATE OR TERMINATE INTERSTATE TOLL SERVICES AT PRICES OTHER THAN PART 69 ACCESS CHARGES

The Commission's Part 69 access charge rules require telephone companies that provide services and facilities "for the origination or termination of *any interstate* [service]" to assess access charges.[4] Permitting IXCs to obtain unbundled network services and facilities pursuant to the 1996 Act's local interconnection provisions, solely to carry originating or terminating interstate toll traffic, would directly contradict the policies underlying the current access charge rules, and significantly disrupt the jurisdictional balance between intrastate and interstate cost recovery. NECA asks the Commission to affirm that services and facilities used solely for interstate access remain subject to the access charges of Part 69, at least until such time that the Commission revises its current rules governing the identification and recovery of interstate access costs.

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[4] 47 C.F.R. §§ 69.1(a), 69.2(b) [emphasis added]. *See also* § 69.1(b) (stating that "charges for such access service shall be computed, assessed and collected . . . as provided in this Part").

In its *Local Competition Reconsideration Order*,[5] the Commission found that "[a] requesting carrier that purchases an unbundled local switching element for an end user may *not* use [it] to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service." The Commission clearly recognized that a contrary ruling would undermine the current Part 69 access charge rules, which were designed to establish mechanisms for compensating local exchange carriers for the use of their networks to originate or terminate interstate toll traffic. No basis exists for reaching a different result here.

The Commission's access charge plan, and the Part 36 jurisdiction separations rules on which it is based, form a complex jurisdictional balance. If the Commission were to allow carriers to evade payment of *interstate* access charges by purchasing unbundled network elements at pricing standards determined by *state* regulatory authorities, substantial shifts in jurisdictional cost recovery could result, with dramatic adverse consequences for carriers subject both to the Commission's interstate access charge rules and state access charge pricing rules.

Prior to undertaking substantial revisions to the current separations and access charge rules, the Commission should obtain and consider recommendations from a Federal-State Joint Board, and provide adequate public notice and opportunity for interested persons to comment.[6] As the U.S. Appellate Court for the Eighth Circuit recently made clear, there remains a strong

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[5] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) at ¶ 13 [emphasis added].

[6] 47 U.S.C.A. § 410(c); 5 U.S.C.A. §§ 552-553. *See also* In the Matter of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Order*, CC Docket No. 80-286, 78 F.C.C. 2d 837 (1980). *See* NECA Comments at 3-4; Missouri PSC at 9-10; National Association of Regulatory Utility Commissioners at 32-33; and Pa. PUC at 28. *See also* Florida PSC at 34-35; GTE at 78; NYDPS at 10-11; NYNEX at 18-19; Oregon PUC at 29; and U S WEST at 10.

need for jurisdictional separation between federal and state regulation.[7] Current jurisdiction cost recovery methods should not be undermined without extensive consideration of related issues, including separations reform and further access reform.[8] The Commission should therefore clarify in this proceeding that carriers cannot obtain unbundled network elements solely for purposes of originating or terminating interstate toll services.

II. THE 1996 ACT AND ITS LEGISLATIVE HISTORY MAKE CLEAR THAT SECTIONS 251 AND 252, INCLUDING 251(c)(3), DO NOT APPLY TO THOSE CARRIERS WHO DO NOT COMPETE IN THE LOCAL MARKET

As the Commission has noted from the start, the purpose of this local competition proceeding has been to implement provisions of the 1996 Act requiring *local* interconnection.[9] Similarly, the U.S. Appellate Court for the Eighth Circuit, in its recent review of the Commission's *Local Competition Order*, appeared to base its decision on the premise that section 251 applies to companies "seeking to enter the local telephone service market."[10] Rules that permit carriers to use local interconnection services and facilities to originate or terminate interstate toll services go far beyond the scope of this proceeding and relevant statutory

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[7] *See generally, Iowa Utilities Bd. v. FCC and consolidated cases*, No. 96-3321 *et al.*, 1997 WL 403401 (8th Circ., July 18, 1997) (*Iowa Utilities Bd. v. FCC*).

[8] The Commission itself seemed to acknowledge the need for separations reform when it indicated in its Access Charge Reform NPRM that it would "soon begin a related proceeding to examine its jurisdictional separations rules." Access Charge Reform, *Notice of Proposed Rulemaking*, FCC 96-488 (rel. Dec. 24, 1996) at ¶ 6 and note 340.

[9] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 96-182 at ¶¶ 1-2 (rel. April 19, 1996) (emphasis added); *Report and Order*, 11 FCC Rcd 15499 at ¶ 6 (1996).

[10] *Iowa Utilities Bd. v. FCC* at WL 403401-02.

provisions, including section 251(c)(3).

As NECA and many other commenters have already discussed in this docket, an examination of the 1996 Act's legislative history and various provisions, including sections 251(g) and (i), make clear that section 251 was not designed to allow telecommunications carriers to circumvent the current tariff-based system of interstate access charges.[11] The legislative history for the Senate bill version of section 251 of the Act provides:

> The obligations and procedures prescribed in this section *do not apply* to interconnection arrangements between local exchange carriers and telecommunications carriers under Section 201 of the Communications Act *for the purpose of providing interexchange service,* and *nothing* in this section is intended to affect the Commission's access charge rules.[12]

In addition, section 251(g) states that equal access and nondiscriminatory interconnection provisions that were effective prior to the Act's enactment on February 8, 1996 remain in place between incumbent LECs and IXCs "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment."[13] The

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[11] *See* NECA Comments at 4-5; USTA at 61-63; Ad Hoc Coalition of Telecommunications Managers at 6; Bell Atlantic at 8; BellSouth at 60, 62, 76-77; GTE 74-76, 78; Rural Telephone Coalition (RTC) at iv-v; Michigan ECA at 56-58; Minnesota at 37-38; Ameritech at 18, 21; NYNEX at 9, 14, 17-19, 21; ALLTEL at 13; Pacific Telesis at 25, 78; PRTC at 12; SBC Communications (SBC) at 3, 77; SNET at 25; U S WEST at 12, 62; NYDPS at 10-11; and the Florida PSC at 34-35. NYNEX provides a particularly thorough analysis (based on the statutory language, legislative history, statutory structure and purpose, and the effect on federal and state jurisdiction) to explain why application of section 251 does not apply to an incumbent LEC's interconnection with an IXC to enable the IXC to transmit and route interexchange traffic. NYNEX at 9-21.

[12] *Joint Explanatory Statement* at 117 [emphasis added]. This Senate bill version was incorporated into the final 1996 Act.

[13] 47 U.S.C.A. § 251(g).

Joint Explanatory Statement states that this section was included to ensure that "equal access and nondiscrimination restrictions and obligations, *including receipt of compensation*," stay in place until the Commission deems it necessary to promulgate new regulations.[14]

Finally, to remove any further doubt, Congress put in a savings provision at section 251(i) which states that nothing in the Act is meant to limit or affect the Commission's authority under section 201. The current access charge system was adopted pursuant to section 201.

Neither the House Amendment nor the Conference Agreement reflect any comments contradicting the legislative history, or sections 251(g) or (i). Nor is there anything else in the Act or legislative history to indicate that subsection 251(c)(3) is to be an exception to section 251's purpose of opening the local telephone markets to competition. Thus, the access charge rules remain fully effective and should not be changed in this local competition proceeding.

CONCLUSION

IXCs should not be permitted to obtain local "services and facilities" solely to originate or terminate interstate toll services at prices other than Part 69 access charges. Sections 251 and 252 of the 1996 Act, including section 251(c)(3), are intended to apply only to those carriers actually competing in the local exchange market, not to those providing only interstate toll services. Any decision to allow IXCs to avoid access charges, as part of the local

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[14] *See Joint Explanatory Statement* at 123 [emphasis added]. Although the legislative history discusses the need for this section because the AT&T and GTE Consent Decrees are nullified by the Act, the statute itself states that all local exchange carriers are covered under this provision.

competition proceeding, is premature at best and fails to recognize the interdependencies of separations rules, access reform and local interconnection.

Respectfully Submitted,
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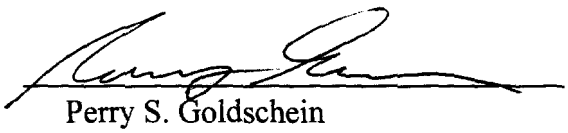
October 2, 1997

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served this 2nd day of October 1997, by mailing copies thereof by United States Mail, first class postage paid or by hand delivery, to the persons listed below.

By: 
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